Supreme Court, U.S.
FILED
AUG 8 1991
OFFICE OF THE CLERK

(3)

No. 90-1899

In the Supreme Court of the United States

OCTOBER TERM, 1991

GULF STATES UTILITIES COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly deferred to the Federal Energy Regulatory Commission's construction of the term "facility," as used in Section 201(18) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 796(18).

2. Whether the court of appeals properly determined that petitioner's claim that FERC in this case improperly attempted to regulate the retail sale of electricity, in contravention of 16 U.S.C. 824a-3, was not ripe for judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 922 F.2d 873. The orders of the Federal Energy Regulatory Commission (Pet. App. 11a-28a, 29a-49a) are reported at 48 F.E.R.C. ¶ 61,130, and 49 F.E.R.C. ¶ 61,209, with concurring opinions (Pet. App. 24a-28a, 38a-49a) ~~are~~ reported at 49 F.E.R.C. ¶ 61,178 and 50 F.E.R.C. ¶ 61,195 (1990).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1991. A petition for rehearing was denied on March 14, 1991. Pet. App. 8a. The peti-

tion for a writ of certiorari was filed on June 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As this Court noted in *FERC* v. *Mississippi*, 456 U.S. 742, 750 (1982), the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (PURPA), "seeks to encourage the development of cogeneration * * * facilities"—*i.e.*, facilities that engage in the production of electricity and useful heat or steam in circumstances where some or all of the heat would otherwise be dissipated into the environment. See also *American Paper Institute* v. *American Elec. Power Corp.*, 461 U.S. 402, 414-415 (1983). To this end, Section 210(a) of PURPA, 16 U.S.C. 824a-3(a), directs the Federal Energy Regulatory Commission to prescribe rules under which electric utilities are required to provide power to and purchase surplus power from "qualifying cogeneration facilities." Section 201(18)(A) of PURPA, 16 U.S.C. 796(18)(A), defines a "cogeneration facility" as "a facility which produces—(i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." It also defines a "qualifying cogeneration facility" (a "QF") as a cogeneration facility that:

> (i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and (ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely

from cogeneration facilities or small power production facilities).

16 U.S.C. 796(18)(B).

Pursuant to its rulemaking authority, the Commission has established two prerequisites to the certification of a "cogeneration facility" as a "qualifying [cogeneration] facility." 18 C.F.R. 292.203(b). First, the facility must meet certain operating and efficiency standards. See 18 C.F.R. 292.205(a) and (b). Second, not more than 50 percent of the equity in the facility may be owned by an electric utility. See 18 C.F.R. 292.206(b).[1] If these two criteria are met, a "cogeneration facility" must be certified as a "qualifying cogeneration facility." See *PRI Energy Systems Inc.*, 26 F.E.R.C. ¶ 61,177 (1984). The Commission's rules require electric utilities to interconnect with the QF, purchase energy from the QF, and provide power to it in certain circumstances. 18 C.F.R. 292.303 and 292.305(b)(1).[2]

2. On February 24, 1987, Union Carbide Corporation (Union Carbide) and Fina Oil and Chemical Company (Fina) filed a joint application requesting

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[1] 18 C.F.R. 292.206(a) provides that a "cogeneration facility * * * may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities * * *)." In turn, the regulations define "ownership" as ownership of "more than 50 percent of the equity interest in the facility." 18 C.F.R. 292.206(b).

[2] FERC has promulgated rules requiring utilities to sell power to qualifying cogeneration facilities to supplement the facility's own power production and to replace power lost by the facility during scheduled maintenance or unscheduled outages. See 18 C.F.R. 292.305 and 18 C.F.R. 292.101(b)(8)-(11).

the Commission to certify a proposed cogeneration facility to be owned by both as a QF. Pet. App. 58a. The application stated that Fina and Union Carbide had entered into a partnership known as "Fin-Lin" to construct the facility and oversee its management. The facility's power-producing component would produce both electricity and industrial-process steam, and would be located at the site of Fina's oil refining plant in Port Arthur, Texas. *Id.* at 16a, 52a. Both steam and electric power produced at the facility would be used to operate the Fina refining plant, located directly adjacent to the cogeneration unit. In addition, electric power produced by the facility would be transmitted through a private 1.7 mile transmission line to a nearby Union Carbide plant in Groves, Texas. *Id.* at 52a-53a.

Petitioner, the utility in whose service area the facility would be located, opposed inclusion of the Union Carbide plant in the QF. In pertinent part, petitioner argued that the Union Carbide plant was a customer purchasing electricity from the cogeneration facility and not itself a part of that facility. Pet. App. 60a.

3. On September 28, 1987, the Commission issued an opinion certifying the proposed facility, including the Union Carbide plant, as a "qualifying cogeneration facility" within the meaning of Section 201(18) of PURPA, 16 U.S.C. 796(18). Pet. App. 58a-68a. On review, the court of appeals found that the Commission had failed to provide "a coherent explanation for its determination that the Union Carbide plant is so integral a part of the Fin-Lin facility as to entitle it to back-up power from Gulf States." *Id.* at 56a. The court therefore remanded the case to the Commission for further explanation; it also urged the Commission to give guidance as to the criteria

it would employ in making QF determinations in the future. Pet. App. 57a.

4. On remand, the Commission found that Union Carbide's plant "is so integral a component of the cogeneration facility" that it should be certified as part of a QF. Pet. App. 19a. The Commission articulated four factors on which it based its decision:

> (1) whether the power consuming component is owned by the owner or operator of the power producing component;
> (2) the geographic location of the consuming component served by the power producing component;
> (3) functional characteristics; for example, whether the power line used to transmit energy is a private line that is part of an integrated industrial operation; and
> (4) the presence of a customer/supplier relationship between the applicants.

Id. at 19a-20a (footnote omitted). Applying these factors, the Commission concluded that (1) Union Carbide was a part owner of the power production components of the facility; (2) Union Carbide's plant was located only 1.7 miles away from the Port Arthur power production equipment; (3) the line used to transmit electrical power to Union Carbide was a private transmission line—analogous to the internal wiring in a single plant—jointly owned by Fina and Union Carbide with only one connection point to petitioner's transmission system, thus indicating that the components of the project were "part of an integrated industrial operation"; and (4) there was a longstanding supplier-customer relationship between Union Carbide and Fina before they entered into this joint venture, since the Union Carbide plant

has long been Fina's major supplier of nitrogen, a critical raw material in Fina's process.[3] *Id.* at 20a-22a. The Commission therefore concluded that the project should be granted QF status. See *id.* at 20a-23a, 33a-37a.

5. The court of appeals affirmed. Pet. App. 1a-7a. The court first rejected petitioner's argument that FERC had failed to accord the word "facility" in Section 201(18) of PURPA, 16 U.S.C. 796(18), its plain meaning. Pet. App. 4a. The court explained that, if the earlier panel that considered the case had believed Gulf States' argument that the term "facility" was unambiguous, it would not have remanded the case to FERC. The court observed:

> In any event, the word "facility" is not defined in the statute, nor in the legislative history, and we do not think it has a "plain meaning" that would preclude its application to this arrangement. Like "stationary source," it is an imprecise term that an administrative agency is given implicit authority to construe, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843-45 (1984), and we must therefore defer to a reasonable interpretation and application of such a term.

Pet. App. 4a-5a.

Having found that the meaning of the term "facility" is not clear on the face of the statute and that *Chevron* deference is required, the court concluded that the Commission's four-pronged test, as applied to the facts of this case, is a "reasonable" interpre-

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[3] The Commission noted that "just as the electricity will be distributed to Union Carbide over a 1.7-mile-long power line, the nitrogen is presently piped to Fina via an approximately 1.7-mile-long pipeline." Pet. App. 22a.

tation of the statute. Pet. App. 5a-7a. As the court observed, "the task of measuring the degree of integration between production and consuming units is not susceptible to any bright line rules—petitioner's counsel was not able to suggest one—and therefore we are hardly in a position to reject the Commission's reasoning." *Id.* at 6a.

Petitioner had also alleged that the transmission of electricity to the Union Carbide plant was a retail sale—a "sale for purposes other than resale"—beyond FERC's jurisdiction under PURPA Section 210(a), 16 U.S.C. 824a-3(a). Relying on its earlier decision in *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988), the court did not reach this issue, holding instead that the issue was "not properly before us" and "should be raised first before the state regulatory agency." Pet. App. 3a n.1.

ARGUMENT

1. Petitioner first contends (Pet. 9-13) that the court of appeals did not adequately address its claim that the Commission's construction of the statutory term "facility" in this case is not entitled to *Chevron* deference because that term is not broad enough to cover both the Union Carbide plant and the other components of the proposed QF. According to petitioner, the court below erred by assuming that, since the previous panel remanded to the Commission for further explantion of its reasons for including Union Carbide within the QF, that panel must not have viewed the statutory language to exclude unambiguously the Union Carbide plant. Petitioner's contention that the court of appeals misread its own prior opinion is mistaken and would not in any event warrant further review.

First, the court of appeals was correct in concluding that the earlier panel must have found that the term "facility" was ambiguous. Under the well-settled principles articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is only after a court determines that the language of a statute is not plain that it defers to the agency's interpretation. Accordingly, if the term "facility" could not be construed to be broad enough to include the Union Carbide plant in this case, a remand to the Commission to explain its reasoning would have been pointless.

In any event, the court of appeals independently inquired whether the term "facility" had an unambiguous meaning, concluding that "the word 'facility' is not defined in the statute, nor in the legislative history, and we do not think it has a 'plain meaning.'" Pet. App. 4a. Any possible error in the court's interpretation of its own earlier opinion in this case therefore had no effect on its decision.

Finally, the court of appeals was correct in concluding that the meaning of the term "facility" does not unambiguously exclude the Commission's interpretation of that term as applied to this case.[4] In-

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[4] Indeed, prior to either panel's decision in this case, the District of Columbia Circuit had already determined in *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243 (1988), that the term "facility" in Section 201 of PURPA is not unambiguous and that deference to the Commission's view of its meaning was required. Although petitioner correctly asserts (Pet. 11 n.8) that a term may be ambiguous as applied to a particular set of facts and unambiguous when applied to another, the issue in *Puerto Rico Electric*—whether a power-consuming plant and a power-producing plant that is adjacent to it but under different ownership may together form a single QF—is closely related to the issue in this case—whether a power-consuming plant and a power-producing plant that is not

deed, both dictionary definitions of "facility" cited by petitioner as evidence of the ordinary usage of the term are consistent with the Commission's interpretation. Pet. 3 & n.1. In particular, the thrust of the Commission's decision was that, in the words of one of the definitions cited by petitioner, the proposed QF is a "collection of integrated elements which has been designed and constructed to achieve some purpose." *Black's Law Dictionary* 531 (5th ed. 1979). The other dictionary defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Webster's Third New Int'l Dictionary* 812-813 (1986). In light of the long-standing integration between the Union Carbide and Fina facilities noted by the Commission, that definition could hardly be said to preclude the Commission's interpretation of the term in this case.

2. Petitioner contends (Pet. 13-14) that the court of appeals "erred in concluding that the question of the status of the Fin-Lin/Union Carbide transaction as a retail sale was not properly before it." In *Puerto Rico Electric*, 848 F.2d at 248-249, the court of appeals had similarly refused to decide whether the transmission of electric power from one component of a QF to another was a "retail sale." In this case, the court simply relied on *Puerto Rico Electric* to find that the issue should "be raised first before the state regulatory agency." Pet. App. 3a n.1.[5]

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geographically contiguous to it but is partly owned by it may together form a single QF.

[5] Petitioner's transcription of footnote 1 of the court of appeals' opinion (Pet. App. 3a) contains a typographical error. The footnote should read:

> Petitioner also argues that FERC has violated the Act by implicitly authorizing an actual retail sale of power from

The question that petitioner believes the court of appeals should have decided has two aspects: first, whether the FERC order certifying the QF authorized the transmission of electricity from the producing component of the QF to all of the consuming components (including the Union Carbide plant), and, second, whether, if it did, transmission of electricity from one component of the QF to another is a "sale for purposes other than resale" within the meaning of PURPA Section 210(a). With respect to the first question, the Commission's rules concerning QFs do not expressly govern the allocation of electricity within a QF. Nor do any of the Commission's orders in this case expressly require or forbid one part of the QF to supply electric power to another. The court of appeals thus may well have believed it appropriate to defer resolution of this question until it is raised in a more concrete factual setting.

Even if the court of appeals should have reached this issue, however, it is clear that, as the Commission explained in a post-argument submission to the court of appeals, "implicit in the Commission's grant of certification" to a QF is the determination "that a proposed facility's transaction *inter se* does not encompass a retail sale." See Pet. App. 76a; see also Pet. App. 64a-66a. Indeed, the question whether transmission of electric power within the QF constitutes a "sale for purposes other than resale" under 16 U.S.C. 824a-3(a) is at bottom no different from the first question presented by petitioner: whether

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Fin-Lin Union Carbide. In *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243 (D.C. Cir. 1988), however, we said that whether or not that transaction was a retail sale was not properly before us; it should be raised first before the state regulatory agency.

Gulf States Utilities Co. v. *FERC*, 922 F.2d 873, 874 n.1 (D.C. Cir. 1991).

the various component parts of the Fin-Lin project may together be certified as a single "facility" under PURPA. If, as the Commission found, those component parts do compose one facility, then transmissions of electric power within the QF do not implicate a distinct "buyer" and "seller," and consequently cannot be characterized as a "*sale* for purposes other than resale" (emphasis added). All of the facts that support the Commission's determination that there is a single facility—including the joint ownership of the QF and the fact that the cogenerated power will never leave the property of either Fina or Union Carbide—equally support the conclusion that there is no retail "sale" for PURPA purposes when electricity is transmitted within the QF.

3. Finally, petitioner claims (Pet. 14-16) that the Commission has "distorted" congressional goals in enacting PURPA by giving rise to the possibility that increasing use of cogeneration could "compromise the utilities' ability to serve their remaining customers economically." Here, too, petitioner's claims are flawed.

This Court has already concluded that Congress's overriding concern in enacting PURPA was to "lessen the country's dependence on foreign oil * * * and to control consumer costs." *FERC* v. *Mississippi*, 456 U.S. at 746. In enacting PURPA, Congress recognized that increased electric energy production by QFs could replace more expensive and less efficient generation by utilities and would help avoid or defer construction of generating capacity. See *FERC* v. *Mississippi*, 456 U.S. at 750, 757. In short, when Congress enacted PURPA, it was clearly cognizant of the possibility that QF certification could "lead to diversion of a large portion of existing utility industrial load to cogeneration by multi-customer qualify-

ing facilities"—the very result here complained of by petitioner (Pet. 16). That Congress nonetheless enacted the statute underscores the invalidity of petitioner's assertion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45011